No. 92-6921

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1992

ROY LAWRENCE BOURGEOIS,
CHARLES JOSEPH LITEKY, and
JOHN PATRICK LITEKY,

Petitioners.

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

The United States has mischaracterized the issue in this case as whether the district judge abused his discretion by refusing to recuse himself under 28 U.S.C. §455(a). The issue is not such a mixed matter of fact and law. The trial judge's impartiality demonstrated both in the 1983 bench trial and the 1991 jury trial were not submitted as a reason for granting the Petition For A Writ Of Certiorari. Rather, only the pure legal question of the proper standard to be applied in a recusal motion under 28 U.S.C. §455(a) is presented.

The United States argues that the facts of United States v. Chantal, 902 F.2d 1018 (1st Cir. 1990), are more egregious than the facts herein and opines that the First Circuit may not have recused in the instant case. (Brief for United States, pp. 3-4). While the United States' argument misrepresents the facts, ultimately, such mischaracterization is irrelevant to whether the court failed to apply the correct legal standard.

United States v. Chantal, supra, the legislative history of 28 U.S.C. §455(a), legal commentators, and other Circuit decisions cited in the Petition For A Writ Of Certiorari (pp. 8-11), establish that bias may arise from either a judicial or extra-judicial source. The trial judge here refused to consider the bias of judicial source; the government now cannot be heard to argue that had the trial court or Eleventh Circuit used the proper standard, they may have denied the recusal motion anyhow.

Judicial impartiality is essential for a fair and effective judicial system. United States v. Alabama, 828 F.2d 1532, 1539 (11th Cir. 1987). An abuse of discretion standard on facts not considered by the trial court has no application to this petition. Only if the federal trial courts uniformly apply the proper standard for recusal will this essential be vindicated.

Finally, the United States questions how codefendants John and Charles Liteky could join in the recusal motion against the trial judge inasmuch as they were not defendants in the 1983 trial. First, the Litekys were charged and tried jointly with Father Bourgeois before the same jury. Second, in the 1983 transcript, which should not have been ignored in passing on the recusal motion, it was obvious the trial judge was impatient with Father Bourgeois and his co-defendants, disregarded the defense of all defendants, and showed animosity toward Father Bourgeois as well as his two similarly situated codefendants. Therefore, the Litekys' joint recusal motion with Father Bourgeois appropriately anticipated the trial judge's interjections and harsh criticism of codefendants jointly engaged in the alleged criminal protest.

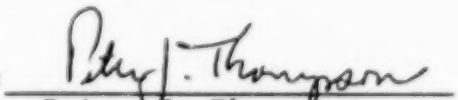
CONCLUSION

The failure of the United States to address the legal issue underscores the irreconcilable split in the Circuit Courts of Appeal requiring an extra-judicial source requirement for recusal under 18 U.S.C. §455(a). The Eleventh Circuit is not only at odds with other courts of appeal, but also with the statutory language, the legislative history, and the analysis of legal commentators. We request the Court grant the Petition For A Writ Of Certiorari.

Dated: March 26, 1993

Respectfully submitted,

THOMPSON, LUNDQUIST & SICOLI, LTD.

By: 

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